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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

DINH TON THAT, Plaintiff and Appellant, v. ALDERS MAINTENANCE ASSOCIATION, Defendant and Respondent.	G044799 (Super. Ct. No. 30-2010-00350755) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory H. Lewis, Judge. Affirmed in part, reversed in part, and remanded.

Dinh Ton That, in pro. per., for Plaintiff and Appellant.

Law Offices of Nicholas T. Basakis and Nicholas T. Basakis for Defendant and Respondent.

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* Pursuant to California Rules of Court, rule 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of Part II.C.

Plaintiff Dinh Ton That disagreed with the results of a recall election conducted by his homeowners association. He first brought a small claims action, then a writ of mandate, and then the instant action, asserting violations of association rules and the relevant statutory scheme. Defendant Alders Maintenance Association demurred to his complaint, arguing the statute of limitations had run on his first cause of action. The court sustained the demurrer. Plaintiff amended his complaint, adding a second cause of action under Business and Professions Code section 17200. Defendant again demurred, arguing a number of reasons why such a claim could not be maintained. The court sustained the second demurrer without leave to amend. The court also awarded defendant attorney fees of approximately $15,000. Plaintiff argues this should be reversed because the relevant statute does not specify that prevailing associations are entitled to attorney fees.

In the unpublished portion of this decision, we agree with defendant that the one-year statute of limitations bars plaintiff's first cause of action. In the published portion, we agree with defendant that in the present context, a homeowners association is not a "business" within the meaning of Business and Professions Code section 17200. We agree with plaintiff, however, that the relevant statute does not permit the association to recover attorney fees, despite our agreement with the trial court's conclusion that the action was frivolous.

I

FACTS AND PROCEDURAL HISTORY

Plaintiff is a homeowner in The Alders, a 248-unit condominium complex in Irvine. The Alders is maintained and governed by defendant. In early 2009, a number of homeowners, including plaintiff,[1] attempted a recall of the sitting Board of Directors. The recall election took place on February 9. It did not, however, achieve a quorum,

[1] According to the property manager, defendant had previously received a judgment against plaintiff for $177,904.69.

which required 50 percent of the membership to be present in person or by proxy. While 124 members were required for a quorum, 119 members were present at the meeting. A motion was made by director Joseph Brockett to close the meeting, and the motion was seconded and approved. According to defendant, prior to the meeting's closure, no motion was made to adjourn the meeting to a later time. One member did raise the question of an adjournment after the meeting was closed, but the closure of the meeting prevented further official business. The closure of the meeting without adjournment[2] essentially concluded the recall effort.

On February 26, plaintiff filed a small claims action seeking $500 as a civil penalty. He alleged defendant and certain individuals "wrongfully . . . required a quorum" and failed to give the members present an opportunity to adjourn the meeting. Plaintiff also sought injunctive relief that would require defendant to bring the 119 proxies and ballots to the court hearing and require counting by an independent third party. On March 6, the small claims court filed an order stating that it had determined "Small Claims court does not have jurisdiction to monitor elections." Plaintiff filed a dismissal without prejudice on April 8.

On March 9, plaintiff filed a verified "Emergency Petition for Peremptory Writ of Mandate in the First Instance as well as for an Alternative Writ" in superior court. He sought a court order directing defendant to conduct the recall election at an adjourned meeting with a smaller quorum. On March 20, the court denied the petition as well as plaintiff's request for reconsideration.

Plaintiff appealed on May 19, 2009. (*That v. Alders Maintenance Association* (G042070, app. dism. Oct. 1, 2009).) That case was briefed, but while the matter was pending, defendant conducted its regular annual election on July 29.

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[2] Had the meeting been adjourned, it would have continued the recall election to a later date with a smaller quorum requirement.

Defendant filed a motion to dismiss the appeal, which we granted on October 1, 2009 on the grounds that it was moot. The remittitur was issued on December 1.

Once back in the trial court, plaintiff sought leave to amend his complaint to state a cause of action for "Declaratory, Injunctive Relief and Civil Penalties per [Civil Code] § 1363.09." In addition to declaratory and injunctive relief (the precise nature of which is unclear), plaintiff sought $2,000 in civil penalties for violating the Civil Code relating to association election laws.

The motion for leave to amend was initially set for hearing on February 1, 2010. On December 21, 2009, at a case management conference, the hearing was continued to March 1, 2010 at the request of defendant's counsel on grounds of medical necessity. At that hearing, plaintiff acknowledged that his claim was governed by a one-year statute of limitations.

On March 1, the court denied the motion for leave to amend, finding that a writ petition was not a pleading which was subject to amendment under Code of Civil Procedure, section 473, subdivision (a)(1). Further, plaintiff had not met the necessary procedural requirements.

Plaintiff then filed the instant action on March 5, 2010, nearly 13 months after the February 9, 2009 recall election. On April 28, he filed a first amended complaint (FAC) which purported to allege "Violation of Article 2 of Chapter 4 of Title 6 of Part 4 of Division 2 of the Civil Code, Including Section 1363.03(b), for Declaratory and Injunctive Reliefs [*sic*] and Civil Penalties Under Civil Code Section 1369.09." The FAC sought adjudication of the same issues raised in the writ petition, specifically whether defendant and its agents had acted properly during the attempted recall election on February 9, 2009. Plaintiff sought the court's decision on a number of "issues to be decided and permanent injunctions requested." Plaintiff requested civil penalties under Civil Code section 1363.09, subdivision (b), alleging four violations and $2,000 in

penalties. He also requested the court's decisions be "published" to all members of the Association.

Defendant filed a demurrer, arguing the FAC failed to state a claim upon which relief could be granted. Defendant argued that the FAC was time-barred by Civil Code section 1363.09, subdivision (a), which states that a cause of action for violating laws relating to association elections must be brought "within one year of the date the cause of action accrues." Plaintiff opposed, arguing judicial and equitable estoppel among other reasons why the demurrer should be overruled. The court sustained the demurrer, but granted plaintiff leave to amend to state another cause of action.

Plaintiff then filed his second amended complaint, which purported to state causes of action for "Violation of Article 2 of Chapter 4 of Title 6 of Part 4 of Division 2 of the Civil Code, Including Section 1363.03(b), for Declaratory and Injunctive Reliefs [*sic*] and Civil Penalties Under Civil Code Section 1369.09, for Violation of [Business and Professions Code] Sections 17200 et seq., for Declaratory and Injunctive Reliefs [*sic*] and Restitution Thereunder." The first cause of action was essentially identical to the FAC. The second cause of action alleged defendant violated the Unfair Competition Law (UCL), Business and Professions Code section 17200, et seq.

Defendant demurred to the second cause of action, arguing the facts in this case, specifically, the conduct of an association recall election, did not state a cause of action under the UCL as a matter of law. Defendant also moved to strike the first cause of action, arguing it was identical to the FAC, which had been the subject of a successful demurrer, as well as parts of the prayer for relief. Plaintiff opposed, offering a number of arguments on both the demurrer and motion to strike. The trial court granted the motion to strike and sustained the demurrer without further leave to amend, noting plaintiff had not met the actual injury requirement for claims under the UCL.

On January 10, 2011, the trial court granted defendant's motion for attorney fees and awarded $15,020.50 pursuant to section 1363.09, subdivision (b). The court found some of plaintiff's actions, including filing a complaint barred by the statute of limitations, "frivolous." Plaintiff filed his appeal on February 9, 2011, and also sought writ relief, which we denied in case G044799.

II

DISCUSSION

Plaintiff seeks review of the trial court's decisions to sustain the demurrers to the FAC and SAC, and to grant attorney fees to defendant.[3]

A. Standard of Review for Demurrers

"In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. 'We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed.' [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]" (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) We review the trial court's decision de novo. (*McCall v. PacifiCare of Cal., Inc.* (2001) 25 Cal.4th 412, 415.)

While a general demurrer admits all facts that are properly pleaded, the "'court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.]'" (*Soliz v. Williams* (1999) 74 Cal.App.4th 577, 584.)

[3] Plaintiff's briefs purport to seek review of other issues as well, but these are the only questions properly before this court, as dictated by the relevant standard of review and substantive law.

B. Relevant Statutory Law

The Davis-Stirling Common Interest Development Act (the Davis-Stirling Act) (Civ. Code, § 1350 et seq.) governs homeowner associations. The Davis-Stirling Act "consolidated the statutory law governing condominiums and other common interest developments. . . . Common interest developments are required to be managed by a homeowners association (§ 1363, subd. (a)), defined as 'a nonprofit corporation or unincorporated association created for the purpose of managing a common interest development' (§ 1351, subd. (a)), which homeowners are generally mandated to join [citation]." (*Villa De Las Palmas Homeowners Assn. v. Terifaj* (2004) 33 Cal.4th 73, 81, fn. omitted.)

Civil Code section 1363.03 et seq. governs association election procedures. Civil Code section 1363.09 creates a right of action for violation of those procedures: "A member of an association may bring a civil action for declaratory or equitable relief for a violation of this article by an association of which he or she is a member, including, but not limited to, injunctive relief, restitution, or a combination thereof, within one year of the date the cause of action accrues. . . ." (Civ. Code, § 1363.09, subd. (a).) The same section permits a court to void an election if it concludes that election procedures were not followed. (*Ibid.*)

Civil Code section 1363.09, subdivision (b) (hereafter subdivision (b)) states: "A member who prevails in a civil action to enforce his or her rights pursuant to this article shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars ($500) for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member of the association equally. A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation."

C. Statute of Limitations on Plaintiff's Civil Code section 1363.09 Claim

As plaintiff admitted in the trial court, the one-year statute of limitations set forth in Civil Code section 1363.09, subdivision (a) governs his claim regarding the election held on February 9, 2009 election. He offers several reasons why the statute of limitations should not bar this cause of action from proceeding.

1. Accrual Date[4]

Plaintiff argues: "In the days after February 9, 2010 [*sic*], (Alders member) Barbara Forgy, plaintiff-appellant and others asked defendant-respondent Alders to correct acts or omissions of its agents by appropriate remedial action within 45-day statutory limit of Corp.C._§_7511(d) i.e. by March 26, 2009. Filing on March 9, 2009 of petition for writ of mandate (and of Small-Claims Action on February 26, 2009) was to exercise plaintiff-appellant's rights and meet that March 26, 2009 deadline. Superior Court's denial of petition on March 20, 2009 or possibly defendant-respondent's filing of opposition to writ-petition on March 18, 2009 is therefore the more appropriate accrual date . . . . So March 5, 2010 is within one year of March 18 or 20, 2009 anyway, and instant action is timely. . . . Also, direct attempts at getting correction count toward limitation per *McDonald infra*." (Some italics omitted.)

Other than his cross-reference to another, unspecified portion of his brief, plaintiff offers no citation to authority supporting the novel contention that an informal request to cure changes the date a cause of action *accrues*.[5] The appellant must "present

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[4] Plaintiff's arguments are set forth across many headings and subheadings, nearly all of which include cross-references to other arguments. While we have read and considered each of plaintiff's arguments, in the interests of brevity and simplicity, we have grouped related legal arguments together.

[5] "The general rule for defining the accrual of a cause of action sets the date as the time when the cause of action is complete with all of its elements." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 389.)

argument and authority on each point made." (*County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591; Cal. Rules of Court, rule 8.204(a)(1)(B)).) It is not the court's responsibility to comb the appellate record for facts or to conduct legal research in search of authority to support the contentions on appeal. (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citation.]" (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852, fn. omitted.) Plaintiff's status as a propria persona litigant does not exempt him from following these basic principles of appellate procedure. (*McComber v. Wells* (1999) 72 Cal.App.4th 512, 522.) In any event, we conclude the cause of action accrued on the date of the recall election, February 9, 2009.

2. Estoppel

Plaintiff argues that either equitable or judicial estoppel should operate to prevent the statute of limitations from being applied here. Equitable estoppel requires that "'"(1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury."' [Citation.]" (*Spray, Gould & Bowers v. Associated Internat. Ins. Co.* (1999) 71 Cal.App.4th 1260, 1268.)

The only fact plaintiff points to here is the one-month continuance on the hearing of plaintiff's motion to file an amended pleading in the writ proceeding. This delay, he claims, led to the filing of the instant action after the statute of limitations had run. Plaintiff's claim that this was a "dilatory tactic" is unsupported by the evidence, and in any event, he was well aware of the statute of limitations issue. He was not, therefore,

"""ignorant of the true state of facts."""" (*Spray, Gould & Bowers v. Associated Internat. Ins. Co., supra,* 71 Cal.App.4th at p. 1268.)

Similarly, judicial estoppel does not apply. Plaintiff claims: "As plaintiff specifically informed the court of the statute of limitation and that, if the court granted continuance requested by defense counsel, plaintiff would have to invoke relation-back doctrine . . . the court is judicially estopped from barring or rejecting or denying or in any way not giving effect to plaintiff's invocation of this doctrine now, even if plaintiff were mistaken in the validity of such invocation . . . ."

The doctrine of judicial estoppel, however, applies to litigants, not the court. Judicial estoppel prevents a *party* from "'asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. The doctrine serves a clear purpose: to protect the integrity of the judicial process.' [Citation.]" (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) This argument, therefore, is without merit.

3. Relation Back

Plaintiff asserts, in a number of different ways that ultimately bring us to the same place, that the date he filed the instant case relates back to his filing of either the small claims action or the writ petition. Therefore, he argues, because he filed the small claims action and the writ petition in a timely manner, the instant case was also timely filed, even though it was filed a month after the statute of limitations had run on his claim. Plaintiff, however, is wrong. Because the small claims action, writ petition and instant case were different, separate cases, the doctrine of relation back does not apply.

The general rule is simple. "[A]n *amended complaint* relates back to the filing of the original complaint, and thus avoids the bar of the statute of limitations, so long as recovery is sought in both pleadings on the same general set of facts." (*Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 934 (*Smeltzley*) (italics added).) More

recent cases are in accord. "The relation-back doctrine requires that the amended complaint must (1) rest on the *same general set of facts*, (2) involve the *same injury*, and (3) refer to the *same instrumentality*, as the original one. [Citations.]" (*Norgart v. Upjohn Co., supra*, 21 Cal.4th at pp. 408-409.)

This rule, however, applies only to amended complaints, not different actions. None of the cases cited by plaintiff apply this rule to a separately filed action, including one relating to the same subject matter. In *Smeltzley*, the plaintiff's amended complaint, filed after the statute of limitations had run, added a new cause of action. (*Smeltzley*, *supra*, 18 Cal.3d at p. 934.) The court held this was permissible under the relation-back doctrine. (*Ibid.*)

In *Barrington v. A. H. Robins Co.* (1985) 39 Cal.3d 146, the issue was whether the plaintiff's complaint, amended to name a Doe defendant with a new cause of action arising from different facts, was properly dismissed for failure to serve within three years. (*Id.* at p. 149.) The California Supreme Court held that the time for service of summons ran from the time of the filing of the amended complaint, because it was based upon different operative facts. In other words, the high court found that the service related back to the amended, not the original, complaint. *Barrington* has no relevance here because it does not involve the statutory deadline for service, but it, like the other cases plaintiff cites, involves an amended complaint.

Plaintiff spends much time arguing that the "form of action" does not or should not matter for purposes of relation back, claiming that the writ petition and the instant action serve the same purposes. Regardless of any merits to this point, it is legally irrelevant. The contemporary relation-back rule applies only to amended complaints. The reason is obvious. If a plaintiff could file an action with a one-year statute of limitations in 2001, dismiss it, and file another action based on the same facts in 2005, claiming the 2005 complaint related back to the 2001 complaint, it would be an exception that swallowed the rule of the statute of limitations. Because this case does not involve

an amended complaint, but a completely separate cause of action, the doctrine of relation back does not apply.

4. Equitable Tolling

Plaintiff also argues that equitable tolling should apply. "Equitable tolling is a judge-made doctrine 'which operates independently of the literal wording of the Code of Civil Procedure' to suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness. [Citations.]" (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370.) Courts have "applied equitable tolling in carefully considered situations to prevent the unjust technical forfeiture of causes of action, where the defendant would suffer no prejudice." (*Ibid.*) For example, in *Elkins v. Derby* (1974) 12 Cal.3d 410, the one-year statute of limitations on a personal injury action was tolled while the plaintiff pursued a workers' compensation remedy. (*Id.* at pp. 414-420.) In *Bollinger v. National Fire Ins. Co*. (1944) 25 Cal.2d 399, the doctrine was applied to toll a 15-month period to sue on a fire insurance policy while a timely prior action, erroneously dismissed as premature, was pending. (*Id.* at pp. 410-412.) In *McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, equitable tolling applied while the plaintiff was exhausting administrative remedies. (*Id.* at p. 101.) All of these cases are distinct from the factual situation here, where plaintiff chose to file a writ proceeding, was completely unsuccessful on the merits, and sought to refile the action as a civil claim.

"'As with other general equitable principles, application of the equitable tolling doctrine requires a balancing of the injustice to the plaintiff occasioned by the bar of his claim against the effect upon the important public interest or policy expressed by the . . . limitations statute.' [Citation.]" (*Lantzy v. Centex Homes*, *supra*, 31 Cal.4th at p. 371.) In this case, we find plaintiff suffered no injustice. He chose to pursue the writ action to its conclusion, even though he was well aware of the one-year statute of

limitations. He could have chosen to file the instant action while the writ proceeding was still pending. Further, applying equitable tolling in this case would contravene a clear legislative intent to resolve association election matters expeditiously.

We also reject plaintiff's request for this court to create some sort of hybrid doctrine, combining selected parts of equitable tolling and relation back. Such a doctrine would contravene clearly established law under each of those separate principles.

In sum, we find the trial court did not err by sustaining the demurrer on the first cause of action. The statute of limitations bars plaintiff's claim as a matter of law, and the second amended complaint therefore fails to state facts sufficient to state a cause of action.[6] (*Blank v. Kirwan*, *supra*, 39 Cal.3d at p. 318.)

D. Plaintiff's Business and Professions Code section 17200 Claim

Plaintiff's second cause of action, offered to circumvent the statute of limitations on the first, is under the UCL. The UCL is codified in Business and Professions Code section 17200 et seq. Section 17200 prohibits any "unlawful, unfair or fraudulent *business* act or practice." (Italics added.)

We cannot find, and plaintiff does not cite, a single published case[7] in which a homeowners association has been treated as a "business" under the UCL, and we

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[6] After addressing the statute of limitations, plaintiff spends a significant amount of his opening brief arguing the "necessity and propriety of declaratory relief . . . and other reliefs for 1st cause of action." Because the first cause of action is barred by the statute of limitations, this substantive argument regarding the same cause of action is irrelevant. The cause of action is barred by law.

[7] Plaintiff cites a number of purported cases currently pending in the superior court, or decided by the appellate division, which have done so. Such cases have no binding or persuasive authority. The only published case involving an association and the UCL our research located was *Turner v. Vista Pointe Ridge Homeowners Assn.* (2009) 180 Cal.App.4th 676, but that case did not address the substance of the plaintiffs' UCL claim. (*Id.* at p. 688.)

are unpersuaded by plaintiff's claims in favor of such a reading of the statute. Plaintiff argues that associations are businesses, citing *O'Connor v. Village Green Owners Assn.* (1983) 33 Cal.3d 790. That case is readily distinguishable. In *O'Connor,* the California Supreme Court held that an association was a "business establishment" under the Unruh Civil Rights Act (Civ. Code, §51). Treating associations as businesses in that context is consistent with — and indeed, necessary for — fulfilling the fundamental purposes of that statutory scheme, the protection of civil rights.

The UCL's purpose does not require the same broad construction of the word "business." "The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. [Citation.]" (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949.) An association does not participate as a business in the commercial market, much less compete in it. The dispute here is not related to any activity that might be deemed in the least bit commercial. Indeed, it is solely related to the conduct of association elections, a subject covered thoroughly by the Davis-Stirling Act itself. (Civ. Code, § 1363.03 et seq.)

We do not foreclose entirely the notion that the UCL could apply to an association. If, for example, an association decided to sell products or services that are strictly voluntary purchases for members or nonmembers, it might be liable for such acts under the UCL. But applying the UCL to an election dispute would simply make no sense. An association, operating under its governing documents to maintain its premises and conduct required proceedings, possesses none of the relevant features the UCL was intended to address. Applying the UCL in this context would both misconstrue the intent of that statute and undermine the specific procedures set forth in the Davis-Stirling Act. An action under the UCL "is not an all-purpose substitute for a tort or contract action." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 173.) We therefore find the court properly sustained defendant's demurrer to the second cause of action.

E. Attorney Fees[8]

Subdivision (b) states: "A member who prevails in a civil action to enforce his or her rights pursuant to this article shall be entitled to reasonable attorney's fees and court costs, and the court may impose a civil penalty of up to five hundred dollars ($500) for each violation, except that each identical violation shall be subject to only one penalty if the violation affects each member of the association equally. A prevailing association shall not recover any costs, unless the court finds the action to be frivolous, unreasonable, or without foundation." The trial court's order stated, in relevant part: "Plaintiff knew when the action was filed that his claims under CC1363.09 were barred by the statute of limitations. Such a bar is grounds for finding an action to be frivolous. [Citations.]"

Plaintiff argues that the language of subdivision (b) does not specifically state that associations are not entitled to attorney fees because the language regarding prevailing associations mentions only "costs" and not fees. Defendant argues that when authorized by statute, reasonable attorney fees are allowable costs, and therefore, once the association has established the action is frivolous, the attorney fees provision becomes reciprocal.

"In ascertaining the meaning of a statute, we look to the intent of the Legislature as expressed by the actual words of the statute. [Citation.] We examine the language first, as it is the language of the statute itself that has 'successfully braved the legislative gauntlet.' [Citation.]" (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1117.) The "resort to legislative history is appropriate only where statutory

[8] Plaintiff requests that we direct "supplemental briefing" on this issue because the word limit on appellate briefs requires him to present his argument in "skeletal" format. The request is denied.

language is ambiguous."[9] (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29.)

While we agree with the trial court's conclusion that plaintiff's decision to file this lawsuit was indeed frivolous,[10] we must also agree with plaintiff that the plain language of the statute does not support an award of attorney fees to defendant, as unfair as that may seem. Statutory[11] attorney fee awards must be *specifically* authorized by a statute. (Code Civ. Proc., § 1021.) While defendant argues that Code of Civil Procedure section 1033.5, subdivision (a)(10) permits recovery of fees as an item of costs, such recovery is only permitted when authorized by contract or statute, which brings us right back around to the language of subdivision (b). Plaintiff points out that if the legislature

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[9] We previously granted defendant's unopposed request for judicial notice of the legislative history of Civil Code section 1363.09. If we were to consider the legislative history, we would find that it provides only limited support for defendant's argument. The legislative history includes a number of committee reports and readings, but most of these documents merely state the bill would allow prevailing associations to recover "litigation costs" if the action is frivolous. Only one document, a partisan bill analysis, states that it would permit recovery of attorney fees by associations. To constitute cognizable legislative history, a document must shed light on the view of the legislature as a whole. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.*, *supra*, 133 Cal.App.4th at p. 30.)

[10] Plaintiff argues that the mere fact that he filed this lawsuit after the statute of limitations had run is not sufficient for a finding of frivolousness. We do not agree with plaintiff that tardiness was the only basis for the court's finding.

[11] Defendant also argues it is entitled to attorney fees based on the CC&Rs. It points to a provision which states: "In the event action is instituted to enforce any of the provisions contained in this Declaration, the party prevailing in such action shall be entitled to recover from the other party thereto as part of the judgment, reasonable attorney's fees and costs of such suit." The trial court rejected this argument, pointing out that no evidence had been presented that the quoted portion of the CC&Rs applied to this case. A copy of the CC&Rs was not provided to the trial court, therefore there was no way to evaluate whether it included any provisions relating to elections, "or that this action implicated any of [the CC&Rs] provisions." For the same reasons, we reject this argument. While the CC&Rs might create an entitlement to attorney fees, defendant simply failed to make the necessary evidentiary showing in the trial court.

had intended the last sentence of subdivision (b) to include attorney fees as well as costs, it could and would have said so. Further, other provisions in the Davis-Stirling Act clearly indicate an entitlement to attorney fees where the legislature deemed them appropriate. (See, e.g., Civ. Code, § 1365.2, subds. (e)(3), (f).) We reluctantly agree.

Defendant's arguments on this point are simply unpersuasive. Defendant asserts the use of the word "any" in the phrase "a prevailing association shall not recover any costs" reflects the legislature's intent to preclude either costs or attorney fees unless the action is demonstrably frivolous. But "any" costs could refer to any of the cost items listed in Code of Civil Procedure section 1033.5, subdivision (a). Defendant also argues plaintiff's interpretation "completely ignores the punitive nature of the provision, which is clearly intended to punish a member who puts an association in the position of having to expend money to defend a frivolously meritless lawsuit." But no such punitive intent is evidenced by the language of the statute. Further, defendant cites no authority in support of its position.

"'This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.' [Citations.]" (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 633.) We sympathize with defendant's position on this issue and agree that the legislature should amend the statute to create an entitlement to attorney fees for the association if an action is "frivolous, unreasonable or without foundation." But we must rule on the statute before us, and therefore we agree with plaintiff that subdivision (b) does not authorize the court to award a prevailing association attorney fees.

III

DISPOSITION

The trial court's decision sustaining the demurrers is affirmed. The order awarding costs to defendant that include attorney fees is reversed, and the matter is remanded to the trial court to enter a new costs award. Each party shall bear its own costs on appeal.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.